



Federal Communications Commission
Washington, D.C. 20554

DA 10-568

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The Alabama Educational Television Commission
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1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

Re: ULS File No. 0003935834

Dear Licensee:

This is with respect to the above-referenced application and associated waiver request filed by The Alabama Educational Television Commission ("AETC"), seeking the reassignment of nine UHF television channels at specified locations in Alabama. AETC states that it is currently the licensee of nine noncommercial educational television stations in Alabama operating as Alabama Public Television ("APT"), and that it will use the additional UHF television channels to complete the construction of the Alabama Digital Emergency/Education Network ("ADEN"). AETC describes ADEN as a statewide public safety and education network.¹ Because AETC seeks to operate on frequencies not designated for public safety entities, it requests a waiver of Sections 73.622, 73.1010 and 90.20(c) of the Commission's rules² pursuant to Section 337(c) of the Communications Act of 1934, as amended, and Section 1.925 of the Rules.³ For the reasons stated below, we deny AETC's request for a waiver and dismiss the application.

Background. AETC was established by the Alabama Legislature in 1953 and is the licensee of nine noncommercial educational television stations in Alabama operating as APT.⁴ AETC states that while it would act as the licensee of the nine new proposed television facilities, these facilities would be available to all state public safety agencies, including the Alabama Department of Homeland Security, the Alabama Department of Public Health, the Alabama Department of Public Safety, the Alabama

¹ Waiver Request at 1-3. AETC submitted a Supplement to its Waiver Request on October 23, 2009. See ULS File No. 0003935834.

² 47 C.F.R. §§ 73.622, 73.1010, 90.20(c).

³ 47 U.S.C. § 337(c)(1); 47 C.F.R. § 1.925.

⁴ These stations are WAIQ, Montgomery, WBIQ, Birmingham, WCIQ, Mount Cheaha, WDIQ, Dozier, WEIQ, Mobile, WFIQ, Florence, WGIQ, Louisville, WHIQ, Huntsville and WIIQ, Demopolis.

Department of Education and the Alabama Emergency Management Agency.⁵ These state agencies provided letters in support of AETC’s application.⁶

AETC proposes to construct television transmission facilities at the following specifications:

City and State	Channel	ERP (kW)	HAAT (m)	Latitude	Longitude
Dozier, AL	16	700	224.8	31-33-16 N.	86-23-32 W.
Florence, AL	17	500	207.6	34-34-41 N.	87-47-02 W.
Mount Cheaha, AL	17	357	577	33-29-06 N.	85-48-32 W.
Birmingham, AL	21	500	412.6	33-29-04 N.	86-46-25 W.
Montgomery, AL	24	1,000	178.7	32-22-55 N.	86-17-33 W.
Louisville, AL	25	500	261.8	31-43-04 N.	85-26-03 W.
Demopolis, AL	51	1,000	325.3	32-21-45 N.	87-52-30.5 W.
Huntsville, AL	31	500	338.2	34-44-13 N.	86-31-45 W.
Mobile, AL	35	150	571.5	30-36-45 N.	87-38-42 W.

With the exception of the proposed Mobile facility,⁷ each new facility would be co-located with the existing AETC television facility for the same community of license; the existing television station antennas would be replaced by a new, Dielectric model circularly polarized antenna so that the licensed television facility and the proposed new facility could duplex signals using one common antenna.⁸

AETC states that the proposed new facilities would be combined with other APT television facilities to create ADEN. According to AETC, ADEN will incorporate a 28-node microwave network that APT has begun constructing pursuant to existing authorizations, with a capacity of 72 Mbps when completed. These facilities and associated two-way radio facilities will be used by Alabama public safety and health agencies as part of a combined communications network. In addition, “APT’s existing satellite capacity and portable uplink capabilities also will be incorporated into ADEN to permit use of satellite communications, including high definition video, when other means are unavailable.”⁹ AETC intends that the proposed new facilities would be used as part of this combined communications network for the one-way transmission of: (1) voice, video and data communications to first responders, including during critical emergency situations such as hurricanes/severe weather and terrorist attacks, (2) preparedness communications within the first responder community, including dissemination of training materials; (3) public safety communications to the general public via standard definition video, including weather alerts, evacuation warnings and instructions on responding to emergency situations; and (4) educational and informational programming to the general public, via standard definition video, when bandwidth is

⁵ *Id.* It does not appear that AETC is directly authorized by the Alabama Legislature to provide public safety services, which are defined by the Communications Act as services “the sole or principal purpose of which is to protect the safety of life, health or property.” 47 U.S.C. § 337(f)(1)(A). Instead, AETC is organized “for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Alabama,” with duties including “controlling and supervising the use of channels reserved by the Federal Communications Commission to Alabama for noncommercial, educational use,” and determining the location and programming for these stations. See Ala. Code § 16-7-5 (2008).

⁶ Waiver Request at Exhibit 1.

⁷ The proposed Mobile facility would be located at an American Tower site and AETC states that it intends to file an application to relocate WEIQ, Mobile to that site as well. Waiver Request at 4; Application, Location 4 Engineering Report at 1.

⁸ Application, Location 1-8 Engineering Reports at 1.

⁹ Waiver Request at 5.

available.¹⁰ Thus, only a portion of the requested bandwidth would be used for public safety transmissions. The remainder would be used for internal public safety training, and educational and emergency broadcasts to the general public.

Discussion. Section 337(c) of the Act provides that the Commission must waive any rules necessary to authorize any “entity seeking to provide public safety services” to operate on unassigned non-public safety spectrum, if the Commission makes five specific findings regarding the entity’s application:

- (A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations;
- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and
- (E) granting such application is consistent with the public interest.

An applicant’s failure to satisfy a single criterion of Section 337(c) constitutes sufficient cause for the Commission to deny a request for waiver.¹¹

As a preliminary matter, when considering requests under Section 337, we first must determine whether the applicant is “an entity seeking to provide public safety services.”¹² While it appears that AETC is a governmental entity, it is not clear from AETC’s description of how it would use the spectrum that it will be providing public safety services, as that term is defined for purposes of Section 337. Section 337(f) defines “public safety services” to mean services “the sole or principal purpose of which is to protect the safety of life, health, or property ...”¹³ AETC argues that it meets this requirement because “the principal purpose of ADEN is to provide a state-wide public safety network that will serve the needs of both first responders and the public.”¹⁴ It appears from AETC’s description of services it intends to provide, however, that voice, data and video communications transmitted to public safety entities would

¹⁰ Waiver Request at 4.

¹¹ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000) (footnotes omitted); *In the Matter of County of Marin, California*, 22 FCC Rcd 9165, 9167 (PSHSB 2007).

¹² 47 U.S.C. § 337(c). Section 337(f) defines the term “public safety services” as “services—

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided—

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.”

¹³ *Id.*

¹⁴ Waiver Request at 8-9.

be sent using “one portion of the bandwidth of each channel.”¹⁵ According to AETC, “spare capacity” would be used to provide educational and informational video programming to the general public.¹⁶ While it appears that AETC would use some portion of the spectrum to provide services directly related to the protection of safety of life, health, or property, we cannot make a determination, based upon AETC’s description of services, that the principal use of the spectrum would be related to such purpose.

With respect to the criteria of Section 337(c), we need not make determinations as to whether AETC meets the requirements of the first three criteria, because we conclude that AETC has failed to demonstrate that the UHF television channels which it requests have been available for digital television use for at least two years. AETC asserts that all of its requested frequencies meet this requirement for reassignment because the UHF band has been allocated for use by television on a regular basis for more than 50 years,¹⁷ and “broadcasters had ample opportunity to request these frequencies for use for their digital television channels in recent years, and they have remained unassigned.”¹⁸ We disagree.

In making a determination of whether frequencies are “unassigned,” we use the technical rules that govern the spectrum requested.¹⁹ While the UHF spectrum (470-698 MHz) has been allocated to the television broadcast service for decades, before a channel can be assigned for use by a specific full power television broadcast station, the channel must first be allotted to a community through a notice and comment rulemaking proceeding.²⁰ Once the channel is allotted, interested parties may file competing applications for a construction permit for the newly allotted channel.²¹ With respect to each channel and community proposed by AETC, we find that potential new entrant broadcasters have been precluded from applying for the channel (i.e., that the channel has been unavailable for assignment) because the channel already was in use by an existing station, either for its analog operations or pre-transition digital operations. In other words, while the spectrum in issue has been allocated for many decades, it is not currently available for assignment, and has not been so available for more than two years.

Specifically, AETC’s proposed digital channels 21 at Birmingham and 31 at Huntsville have not been available for digital television allotment and assignment to new digital television stations because those channels previously were allotted to those communities for analog operations,²² and were licensed to analog television stations WTTO-TV, Homewood, Alabama and WAAY-TV, Huntsville.²³ AETC’s proposed digital channel 35 at Mobile similarly has not been available for digital television allotment and assignment to new digital television stations because analog channel 35 was allotted to near-by Fort

¹⁵ Waiver Request at 9. AETC also indicates that “the vast majority of the reallocated bandwidth would be used at all times for public safety purposes,” but is not clear exactly what those purposes are or what “vast majority” means. Waiver request at 2.

¹⁶ Waiver Request at 9. Other uses include transmitting “preparedness information, including training materials and other information necessary to prepare first responders” to respond to various incidents, and emergency broadcasts to the general public. *Id.*

¹⁷ AETC cites to *Amendment of Section 3.606 of the Commission’s Rules and Regulations*, Sixth Report and Order, 41 FCC 148 (1952). In that proceeding, the Commission finalized “the allocation of the entire UHF television band for use . . . by television on a regular basis.” *Id.* at 155.

¹⁸ Waiver Request at 13.

¹⁹ *See, e.g., Silverbow, Order*, 24 FCC Rcd 12547, 12553 ¶ 14 (PSHSB 2009) (*citing City of El Segundo, Order*, 19 FCC Rcd 6992, 6995 ¶ 8 (WTB PSCID 2004)); *Syosset Fire District, Memorandum Opinion and Order*, 18 FCC Rcd 16635, 16639 ¶ 8 (WTB PSPWD 2003).

²⁰ *See Television Assignments*, Sixth Report and Order, 41 F.C.C. 148, 167 (1952).

²¹ *Riverside and Santa Ana, California*, 65 F.C.C. 2d 920, 921 (1977); *recon. denied*, 68 F.C.C.2d 557 (1968).

²² 47 C.F.R. § 73.606(b).

²³ FCC File Nos. BLCT-19820513KE and BLCT-2537.

Walton Beach, Florida, and licensed to analog television station WFGX-TV.²⁴ With respect to AETC's proposed digital channels 17 at Florence and Mt. Cheaha, those channels have not been available because their allotment would have been short-spaced with the analog channel 17 allotment for WDBB-TV, Bessemer, Alabama, and thus, were technically precluded.²⁵

AETC's proposed digital channels 24 and 25 at Montgomery and Louisville, respectively, have not been available for assignment to new digital television stations at those communities because the pre-transition digital channel 24 allotment for WBBM-TV, Tuskegee, Alabama technically precluded their use at Montgomery and Louisville.²⁶ Similarly, with respect to AETC's proposed digital channel 51 at Demopolis, a new channel 51 digital television allotment at that community was precluded by the allotment of channel 51 as the pre-transition digital channel of WNCF-DT, Montgomery, Alabama.²⁷ Finally, digital channel 16 was not available for assignment to new digital television stations at Dozier because that channel was allotted as the post-transition digital channel for WCOV-DT, Montgomery, Alabama; only after that station petitioned the Commission to substitute channel 20 for its allotted DTV channel 16 and completed construction of the new facility in March 2009, did channel 16 become technically feasible for allotment and use at Dozier.²⁸

Full power television stations were required to cease analog operations no later than June 12, 2009²⁹ and, with minor exceptions not pertinent here, are operating exclusively on their allotted post-transition digital channels. Thus, AETC is correct that its proposals to use various digital UHF television channels at its specified locations are no longer technically precluded by these previously allotted uses. These channels, however, continue to remain unavailable for new digital television channel allotments in and near Alabama due to the ongoing freeze on the filing of petitions for rulemaking to establish new DTV channel allotments.³⁰ Based on the foregoing, we conclude that the Section 337(c)(1)(D) criterion has not been met.

A Section 337(c) waiver also may only be granted where such grant is consistent with the public interest. We conclude that the public interest would not be served by the proposed assignment of a significant amount of television spectrum in the southeast region, for a number of reasons. First, as AETC is well aware, since June 12, 2009, when stations commenced digital-only television operations, a number of television stations have requested the substitution of a UHF channel for their assigned post-transition VHF digital channels, citing viewer reception problems with the VHF channel.³¹ There are approximately 20 television stations located in Alabama and nearby communities in Georgia, Mississippi

²⁴ FCC File No. BLCT-19871026KG.

²⁵ Application, Locations 3 and 8 Engineering Reports at p. 2.

²⁶ Application, Locations 1 and 5 Engineering Reports at 2; *see also* FCC File No. BDTUCT-20090416AXY.

²⁷ Application, Location 6 Engineering Report at 2; *see also* FCC File No. BDTUCT-20090416AXT.

²⁸ Application, Location 2 Engineering Report at 2; *see also* *Montgomery, Alabama*, Report and Order, 24 FCC Rcd 1243 (VD 2009) and FCC File No. BLCDDT-20090312AAO.

²⁹ *See* DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

³⁰ Public Notice, "Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes," 19 FCC Rcd 14810 (MB 2004).

³¹ *See, e.g., Biloxi, Mississippi*, DA 09-2016 (released Sept. 4, 2009)(change from channel 13 to channel 39); *New Orleans, Louisiana*, DA 09-2095 (released Sept. 23, 2009)(change from channel 8 to channel 29); *Jackson, Mississippi*, DA 09-2155 (released Oct. 1, 2009)(change from channel 7 to channel 30); *Ft. Myers, Florida*, DA 09-2456 (released Nov. 20, 2009)(change from channel 9 to channel 50). The Media Bureau recently issued a Report and Order in response to a petition for rulemaking filed by AETC to substitute channel *39 for channel *10 for station WBIQ, Birmingham because of reported VHF reception problems. *Birmingham, Alabama*, DA 10-340 (released March 2, 2010).

and Tennessee currently operating on VHF channels, and AETC's proposed assignment of nine UHF television channels for public safety use would significantly reduce the number of available UHF channels for these stations to use to improve coverage to former analog viewers who are no longer able to view the stations' digital signals.

In addition, full power television stations have only recently released their paired channels, thereby freeing additional spectrum for new digital television channel allotments or redesignation for other uses. We believe it would be premature to reassign the proposed UHF television spectrum as AETC requests – which has only just become available for reallocation or redesignation - before the Commission has had the opportunity to complete its plans for the recovery of spectrum after the transition. In this regard, we note that in 1997, when the Commission adopted the pre-transition digital Table of Allotments, it found it necessary to delete all vacant analog allotments in order to provide all existing full power television stations with a paired digital channel that could replicate their existing analog service areas.³² Several commenters argued that the Commission should retain vacant noncommercial educational allotments, maintaining that public broadcasting capacity is a bedrock Congressional and Commission policy, and that it was important to preserve noncommercial allotments since it can take years to lay the groundwork for a noncommercial application.³³ The Commission was able to replace some existing vacant noncommercial NTSC allotments with new noncommercial reserved DTV allotments, and stated that “after the transition, we also will consider establishing additional noncommercial reserved allotments on recovered spectrum for those existing vacant noncommercial allotments that cannot be replaced at this time.”³⁴ Some of the communities for which the Commission deleted a vacant analog noncommercial allotment include Birmingham, Dothan, Montgomery, Munford and Tuscaloosa, Alabama, Columbus, Georgia, Columbus, Mississippi and Memphis, Tennessee, and it is likely that some or all of the channels specified by AETC could be used to replace these deleted noncommercial educational television allotments.

In addition, Section 307(b) of the Act provides that “the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same.”³⁵ The Commission may upon consideration conclude that additional new allotments may be necessary. For example, we note that the Commission still needs to consider a number of pending applications for analog channels that were allotted to communities that were not allotted a companion digital channel. In addition, we anticipate that in the event the freeze on the filing of new channel allotments is lifted, interested new television broadcast entrants will file petitions for rulemakings to allot channels that were released at the end of the transition.

The Commission also is in the process of considering other uses for spectrum recovered after the digital transition. Provisions of legislation passed in 2008 and 2009 – including the 2008 Farm Bill,³⁶ the Broadband Data Improvement Act of 2008,³⁷ and the American Recovery and Reinvestment Act of

³² Sixth Report and Order, *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, 12 FCC Rcd 14588, 14639 (1997).

³³ *Id.* at 14638.

³⁴ *Id.* at 14639.

³⁵ 47 U.S.C. § 307(b).

³⁶ Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, § 6112, 122 Stat. 923, 1966 (2008).

³⁷ Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (2008)(*codified* at 47 U.S.C. §§ 1301-04).

2009³⁸ - includes requirements for the Commission to administer or play a consultative role in administering several broadband initiatives, programs and policies, and to prepare a National Broadband Plan.³⁹ In connection with developing the National Broadband Plan, the Commission reviewed various spectrum bands – including spectrum currently used by broadcast television stations – to determine whether all or a portion of the spectrum within these bands could be repurposed for wireless broadband purposes.⁴⁰ On March 16, 2010, the Commission submitted a National Broadband Plan to Congress, including a recommendation that the Commission “initiate a rule making proceeding to reallocate 120 megahertz from the broadcast television (TV) bands that can be made accessible for both mobile and fixed wireless broadband use . . .”⁴¹

Under these circumstances, we conclude that AETC’s proposed assignment of nine UHF television channels - which have been subject to recovery only since the end of the DTV transition - for its proposed use would be contrary to the public interest and interfere with the Commission’s exercise of its mandated duties under Section 307(b) of the Communications Act and the Recovery Act of 2009.

For these same reasons, we also conclude that AETC has failed to justify a waiver of the Part 73 rules pursuant to Section 1.925, which states that in order to obtain a waiver of the Commission’s rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the existing case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. As discussed above, grant of the requested waiver would not serve the public interest. We also note that there are reasonable alternatives to AETC’s proposed reallocation. AETC is already the licensee of nine noncommercial educational television stations licensed at the same sites proposed in its application. Provided that a DTV station transmits at least one over-the-air video program signal at no direct charge to viewers on its DTV channel, Section 73.624 of the Commission’s rules permits DTV stations to offer other services, consistent with the public interest, convenience and necessity, on an ancillary basis.⁴² These services may include, but are not limited to, computer software distribution, data transmissions, teletext, interactive materials, aural messages, and paging services, provided on a broadcast, point-to-point or point-to-multipoint basis.⁴³ Accordingly, it appears that most, if not all, of AETC’s proposed uses for the nine new UHF channels it seeks could be met using its existing licensed stations, or by other television stations licensed to communities in Alabama.

³⁸ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009)(“Recovery Act”).

³⁹ See generally *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009). The Recovery Act specifies that the Commission’s plan must include an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States, a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public, an evaluation of the status of deployment of broadband service, and a plan for use of broadband infrastructure and services in advancing a broad array of public interest goals.

⁴⁰ Public Notice, Data Sought on Uses of Spectrum, NBP Public Notice # 26, DA 09-2518 (released Dec. 2, 2009).

⁴¹ FCC, *Connecting America: The National Broadband Plan*, <http://download.broadband.gov/plan/national-broadband-plan.pdf> at Chapter 5, p. 76 (accessed March 25, 2010).

⁴² 47 C.F.R. § 73.624(b) and (c).

⁴³ Section 73.624(c).

In view of the foregoing, we deny the waiver request and dismiss The Alabama Educational Television Commission's application.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau